No. 89-1693

In the Supreme Court of the United States

OCTOBER TERM, 1990

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, PETITIONER

v.

JOSEPH E. O'NEILL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether petitioner breached its duty of fair representation by negotiating a back-to-work agreement that ended a strike by pilots against Continental Air Lines and allocated positions between returning strikers and pilots who worked during the strike.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Since the 1940s, petitioner has represented Continental Air Lines pilots in collective bargaining with the airline. In 1983, after filing a petition under Chapter 11 of the Bankruptcy Code, Continental repudiated its collective bargaining agreements with petitioner and other employee unions and unilaterally imposed "emergency work rules" that cut pilots' salaries by more than fifty percent. In response, petitioner initiated a strike against Continental. Pet. App. B2.[1]

[1] There are four separately paginated appendices to the petition, numbered 1 through 4. To simplify citations, we will cite to them as though they had been denominated A through D.

For the next two years, Continental employed permanent replacements and cross-over strikers as pilots. During that period, the bankruptcy court upheld the airline's rejection of its collective bargaining agreement with petitioner and ordered the parties to engage in collective bargaining. No new agreement was reached, and, by August 1985, working pilots outnumbered strikers by 1,600 to 1,000. At that point, Continental gave notice that it would no longer recognize petitioner as the pilots' bargaining representative. Pet. App. B2-B3.

On September 9, 1985, Continental posted its Supplementary Base Vacancy Bid 1985-5 (85-5 bid) covering some 441 anticipated vacancies for captains and first officers and an undetermined number of second officer vacancies. Pilots interested in those vacancies were invited to submit bids by September 18 specifying their preferred position, base of operations, and aircraft. Vacancies were then to be awarded on the basis of seniority. In order to allow for necessary training, the 85-5 bid was posted substantially in advance of the date when pilots were expected actually to assume the positions covered by the bid. After the date for submitting bids had passed, Continental "awarded" the positions covered by the 85-5 bid to working pilots. Pet. App. B3-B4; see Pet. 4; Br. in Opp. 3.[2]

In late September 1985, the Continental Master Executive Council (MEC)—a committee that served, subject to the authority of petitioner's executive board and board of directors, as the coordinating council for Continental pilots—voted not to return to work, but also authorized its officers and a negotiator to pursue a settlement with Continental. Pet. App. B4. See Pet. C.A. Br. 8; Resp. C.A. Br. 9. During October 1985, representatives of petitioner and Continental agreed to terms for the termination of the strike and the resolution of litigation involving Continental, petitioner, and individual pilots. On October 31, 1985, the bankruptcy court entered an order and award embodying the

[2] Bids for 85-5 positions were submitted not only by working pilots, but also by some strikers. Continental initiated litigation to invalidate the strikers' bids. See Pet. App. B3-B4.

parties' agreement. Pet. App. D.[3] Petitioner consented to the entry of the order and award without providing notice to the striking pilots or the MEC or submitting the agreement for ratification. Pet. App. B4.

Under the order and award, each striker was entitled to select one of three options. Strikers electing Option 1, the most important for present purposes, waived claims against Continental and obtained the right to be reinstated, based upon seniority, in certain positions. The agreement allocated the first 100 captain positions in the 85-5 bid to working pilots. The next 70 captain positions (the remainder covered by the 85-5 bid) were earmarked for returning strikers; however, unlike working pilots, strikers were obligated to accept the base and aircraft type assigned by Continental. The agreement further provided that until October 1, 1988, subsequent vacancies for captain positions would be allocated between working pilots and returning strikers on a one-to-one ratio. Again, whereas working pilots could bid for the base and aircraft type they preferred, returning strikers were required to accept management's choice of base and aircraft.[4] The issue of how vacancies occurring after October 1, 1988, were to be allocated among working pilots and returning strikers was submitted to binding arbitration. *Id.* at B4-B5, D6-D8.[5]

The effect of these provisions was to allocate to returning strikers some of the 85-5 bid positions that, according to Con-

[3] There has been a dispute between the parties as to whether the bankruptcy court's approval of the order and award is relevant to the merits of respondents' fair representation claim. See Pet. App. B11. The court of appeals found that petitioner and Continental had agreed to the material terms of the order, and the court analyzed it as the equivalent of a negotiated agreement. *Ibid.* Petitioner has not sought further review of that determination.

[4] We are advised that Continental abandoned its right to assign returning strikers to positions of its choice in the Fall of 1987. See Motion to Intervene for Limited Purpose and Pet. for Reh'g of Continental Airlines, Inc. at 7.

[5] Under Option 2, pilots waiving claims against Continental received specified severance payments. Pilots choosing Option 3 retained their claims against Continental, but were to be reinstated—based upon the chronological order of their offers to return—only after all pilots choosing Option 1 had been reinstated. Pet. App. B4-B6.

tinental, had been awarded to working pilots. At the same time, the agreement guaranteed working pilots more desirable positions than they could have attained if all 85-5 bid positions and subsequent vacancies had been assigned to working pilots and returning strikers on the basis of seniority alone. It was foreseeable that the effects of placing working pilots in those positions would persist, since (in the absence of a layoff) pilots could not be displaced from positions they occupied. See Pet. App. B5.[6]

2. Respondents have been certified as representatives of a class of pilots who remained off the job until the end of the strike. In their complaint, respondents alleged that petitioner breached its duty of fair representation in negotiating and consenting to the order and award. The complaint also asserted that petitioner's failure to submit the agreement for ratification was a violation of Section 101(a) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 411(a)(1), and advanced two additional causes of action. The district court granted summary judgment in petitioner's favor on all claims. See Pet. App. C.

3. The court of appeals reversed with respect to respondents' fair representation claim. Quoting from this Court's decision in *Vaca* v. *Sipes*, 386 U.S. 171, 177, 190 (1967), the panel stated that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Pet. App. B9. Because *Vaca* "recognizes three distinct standards of conduct," the court continued, "a breach of the duty of fair representation does not require that a union's conduct be taken in bad faith or with hostile discrimination, but may rest upon the arbitrariness or irrationality of the union's acts." *Id.* at B9-B10. Adhering to standards it had announced in *Tedford* v. *Peabody Coal Co.*, 533 F.2d 952, 957 (5th Cir. 1976), the court stated that a union's decision could be considered arbitrary unless it was

> (1) based upon relevant, permissible union factors which exclude[ ] the possibility of it being based upon motivations

[6] With respect to matters other than their initial placement, returning strikers were entitled to exercise their seniority upon being recalled to work. See Pet. App. D9.

> such as personal animosity or political favoritism; (2) *a rational result of the consideration of these factors*; and (3) inclusive of a fair and impartial consideration of the interests of all employees.

Pet. App. B10.

In this case, the court determined, a jury could find that petitioner had acted arbitrarily by agreeing to an order and award that "left the striking pilots worse off in a number of respects than complete surrender to [Continental]." Pet. App. B11. The court explained that returning strikers would have been legally "entitled to reinstatement as vacancies occurred" (*id.* at B12), that Continental "could not have changed its policy of assigning work by seniority * * * unless it had a legitimate and substantial business justification for doing so" (*id.* at B13), and that a trier of fact could find that Continental "likely would have recognized the returning strikers' seniority rights and privileges if they had unconditionally agreed to return to work" (*id.* at B14). The court rejected petitioner's contention that the agreement benefitted returning strikers by giving them access to some of the positions encompassed by the 85-5 bid, ruling that, "under ordinary seniority rules," returning strikers would have been "entitled to fill the vacancies announced in the 85-5 bid." *Ibid.*[7] The court concluded (*ibid.*):

> A factfinder could infer that had [petitioner] unconditionally offered to return the pilots to work, the strikers would have been recalled in seniority order, and would have been able successfully to bid for [85-5 bid] vacancies and also preserve their litigation rights against [Continental].

[7] In support of this conclusion, the court cited *ALPA* v. *United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985), aff'd in part, 802 F.2d 886 (7th Cir. 1986), cert. denied, 480 U.S. 946 (1987). The district court's decision in *United Air Lines* was entered on August 8, 1985, and that case was pending on appeal at the time petitioner agreed to the entry of the order and award in the bankruptcy court. The court of appeals also included a "see also" citation to *Independent Fed. of Flight Attendants (IFFA)* v. *Trans World Airlines, Inc.*, 819 F.2d 839 (8th Cir. 1987), rev'd in part, 109 S. Ct. 1225 (1989). The *IFFA* decision was issued after the entry of the order and award.

In addition, the court of appeals held that respondents had raised a material issue of fact as to whether the order and award unjustifiably discriminated against returning strikers. "Depending upon the explanation offered by [petitioner]," the court concluded, "a factfinder might infer that the negotiated division of pilots into strikers and nonstrikers and the subsequent unfavorable discriminatory treatment of returning strikers constituted a breach of the union's duty of fair representation." Pet. App. B15.[8]

DISCUSSION

The courts of appeals have taken varying positions on the question whether fair representation claims are subject to different legal standards depending on whether they arise from a union's actions in contract negotiations or in contract administration. In our view, the resulting uncertainty warrants this Court's attention. If the Court does grant review and decides—as we believe it should—that a fair representation claim arising in the context of contract negotiations may be based on arbitrary union conduct, this case provides an excellent opportunity to clarify what conduct may properly be characterized as arbitrary. These are important questions. The scope of the duty of fair representation determines the extent to which employees are protected against abuses of statutory authority conferred on unions and also, to a significant degree, controls the ability of unions to act as effective bargaining agents for employees with divergent interests.

1. a. In *Vaca* v. *Sipes*, 386 U.S. at 177, this Court summarized the origins and scope of the fair representation doctrine. The Court noted that a union has a statutory duty to bargaining unit employees "both in its collective bargaining" and "in its enforcement of the resulting collective bargaining agreement." "Under [the fair representation] doctrine," the Court continued, "the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the

[8] The court of appeals affirmed the dismissal of respondents' LMRDA claim. Pet. App. B15-B19. Respondents have not sought further review of that question.

interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Ibid.*

Nothing in *Vaca* suggested that any part of the Court's definition of a union's duty of fair representation was limited to contract administration. Indeed, the Court noted that the duty is derived from the union's authority to act as the exclusive representative of a bargaining unit's employees, and the statutes conferring that authority suggest no distinction based upon the nature of the action taken on employees' behalf.[9] The logic underlying the rule that a union may not act arbitrarily in its capacity as the exclusive representative of bargaining unit employees is no less applicable to collective bargaining than it is to the administration of negotiated agreements. Cf. *Conley* v. *Gibson*, 355 U.S. 41, 46 (1957) (obligation to avoid unlawful discrimination applies equally in both contexts).

The Court has never been squarely presented with the question whether *Vaca*'s three-part standard—which prohibits conduct that "is arbitrary, unjustifiably discriminatory, or in bad faith—applies to the negotiation of a collective bargaining agreement. However, the Court has often described the duty in terms that suggest no essential difference in the standards applicable to negotiating and administering collective agreements. *United Steelworkers* v. *Rawson*, 110 S. Ct. 1904, 1911 (1990); *Chauffeurs Local No. 139* v. *Terry*, 110 S. Ct. 1339, 1344 (1990); *Breininger* v. *Sheet Metal Workers*, 110 S. Ct. 424, 429 (1989); *International Brotherhood of Elec. Workers* v. *Foust*, 442 U.S. 42, 46-47 (1979). See also *Communications Workers* v. *Beck*, 487 U.S. 735, 743 (1988); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 563-564 (1976); *Street, Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 299 (1971); *Humphrey* v. *Moore*, 375 U.S. 335, 342, 350 (1964).[10]

[9] See, *e.g.*, *Steele* v. *Nashville R.R.*, 323 U.S. 192, 198-207 (1944) (Railway Labor Act); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337 (1953) (extending doctrine to National Labor Relations Act).

[10] The discussion in *Terry* is representative. Immediately after quoting *Vaca*'s three-part standard for the duty of fair representation, the Court stated

Contrary to petitioner's contention (Pet. 19), the Court's decision in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337-338 (1953), does not foreclose liability for arbitrary conduct in collective bargaining negotiations. In *Huffman*, while explaining why a union enjoys broad authority to negotiate on behalf of bargaining unit employees, the Court observed (345 U.S. at 338):

> A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

This passage does not suggest that arbitrary conduct is insufficient to sustain a fair representation claim—or that "good faith and honesty of purpose" is invariably a complete defense. In stating that a "wide range of *reasonableness*" was required for effective bargaining, the Court surely did not imply that unions should be immune from liability for arbitrary decisions. And, contrary to petitioner's suggestion, there is no essential conflict between *Vaca* and *Huffman*. *Vaca*'s requirement of non-arbitrariness, properly applied, provides unions with the "wide range of reasonableness" they require for effective negotiations while at the same time protecting employees from arbitrary action. We agree with the court of appeals, therefore, that *Vaca* provides the proper standard for this case and that a union can be held to have violated its duty of fair representation in contract negotiations by acting arbitrarily.

b. Nevertheless, the courts of appeals have expressed a variety of views on this issue. A large number of decisions have applied *Vaca*'s three-part test, including its requirement of non-arbitrary

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that "[a] union must discharge its duty both in bargaining with the employer and in its enforcement of the resulting collective bargaining agreement." 110 S. Ct. at 1344. The plain implication was that the three-part obligation described in *Vaca* applies in both contexts. Compare Pet. 19 n.9 (suggesting that *Vaca* "implicitly recognized • • • two different standards"). To be sure, since *Terry* did not present the question whether arbitrary conduct would suffice to establish a breach of the duty of fair representation, the Court's description of the duty was not a holding. Compare Br. in Opp. 8-9.

action, to the negotiation of collective bargaining agreements.[11] But in a substantial number of decisions, the courts have suggested that there is a difference in kind—warranting a distinction in applicable fair representation standards—between negotiating an agreement on behalf of bargaining unit employees and administering the agreement.

Thus, the Seventh Circuit has stated that "[t]here is one standard for appraising a union's conduct when a claim arises out of union action in negotiating agreements with an employer and a different standard when the claim arises from a union's administration of the collective bargaining agreement, especially in the context of processing grievances." *Schultz* v. *Owens-Illinois Inc.*, 696 F.2d 505, 514 (1982).[12] Recently, extended dicta in two Seventh Circuit decisions have elaborated upon the distinction *Schultz* drew between negotiations and other actions undertaken by a union in its capacity as exclusive representative.[13] A decision

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[11] *E.g.*, *Haerum* v. *ALPA*, 892 F.2d 216, 221 (2d Cir. 1989); *Jones* v. *Trans World Airlines, Inc.*, 495 F.2d 790, 798 (2d Cir. 1974); *Masy* v. *New Jersey Transit Rail Operations, Inc.*, 790 F.2d 322, 327-328 (3d Cir. 1986); *Dement* v. *Richmond, F. & P. R.R.*, 845 F.2d 451, 458 (4th Cir. 1988); *Anderson* v. *Ideal Basic Industries*, 804 F.2d 950, 952 (6th Cir. 1986); *Bowman* v. *Tennessee Valley Authority*, 744 F.2d 1207, 1213-1214 (6th Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *Barton Brands, Ltd.* v. *NLRB*, 529 F.2d 793, 799 (7th Cir. 1976); *Thomas* v. *Bakery Workers Union*, 826 F.2d 755, 758-759 (8th Cir. 1987); *Morgan* v. *St. Joseph Terminal R.R.*, 815 F.2d 1232, 1234 (8th Cir. 1987); *Bernard* v. *ALPA*, 873 F.2d 213, 216 (9th Cir. 1989); *Hendricks* v. *ALPA*, 696 F.2d 673, 677 (9th Cir. 1983); *American Postal Workers Union, Local 6885* v. *American Postal Workers Union*, 665 F.2d 1096, 1105-1107 (D.C. Cir. 1981).

[12] *Schultz* appears to be inconsistent with the standards articulated in the Seventh Circuit's decision in *Barton Brands, Ltd.* v. *NLRB*, 529 F.2d 793, 799 (1976). Further, after explaining that different standards were applicable in contract negotiations and contract administration, *Schultz* went on to analyze whether a reinterpretation of a contract that the court considered analogous to the negotiation of a contract was "patently unreasonable" or "arbitrary." 696 F.2d at 515-516. See also *Alvey* v. *General Electric Co.*, 622 F.2d 1279, 1287-1289 (7th Cir. 1980).

[13] *Thomas* v. *United Parcel Service, Inc.*, 890 F.2d 909, 916-919 (7th Cir. 1989); *Olsen* v. *United Parcel Service, Inc.*, 892 F.2d 1290, 1293-1294 (7th Cir. 1990). See also *United Indep. Flight Officers, Inc.* v. *United Air Lines, Inc.*,

from the Sixth Circuit suggests that "[b]ad faith or intentional misconduct by the union must be shown" to establish a breach of the duty of fair representation in "collective bargaining decisions."[14] In a line of cases, the Ninth Circuit has distinguished "procedural and ministerial" acts, which will be held to violate the duty of fair representation if arbitrary, from acts involving "a union's judgment," which will be held to breach the duty only if discriminatory or in bad faith.[15] The Eleventh Circuit has articulated different standards for fair representation claims arising from collective bargaining and claims arising from grievance processing, although both standards impose liability when a union has acted arbitrarily, and there seems to be little difference

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756 F.2d 1274, 1281-1283 (7th Cir. 1985). The cited passages in *Thomas* and *Olsen* were dicta because the cases involved grievance processing and did not present the question, which *Thomas* and *Olsen* discussed at length, whether *Vaca* applied outside that context. In addition, in *Olsen*, the court stated that a union, when acting as the employees' representative in negotiations, "meets its duty of fair representation • • • by exercising its judgment in a manner that is not patently unreasonable. [*Parker* v. *Connors Steel Co.*, 855 F.2d 1510, 1519 (11th Cir. 1988)] (a union breaches its duty in the negotiation of an agreement if its conduct is 'arbitrary, irrational, or undertaken in bad faith')." We perceive no significant difference in substance between these standards and those articulated in *Vaca*.

[14] *Ratkovsky* v. *United Transportation Union*, 843 F.2d 869, 876 (6th Cir. 1988). See also *NLRB* v. *Local 299, Int'l Brotherhood of Teamsters*, 782 F.2d 46, 50-52 (6th Cir. 1986) (requiring that there have been discrimination against a subgroup of bargaining unit employees). In this respect, *Ratkovsky* appears to be inconsistent with the Sixth Circuit's decisions in *Bowman* v. *Tennessee Valley Authority*, 744 F.2d 1207, 1213-1214 (1984), cert. denied, 470 U.S. 1084 (1985), and *Anderson* v. *Ideal Basic Industries*, 804 F.2d 950, 952 (1986). Further, at one point, *Ratovsky* states that "[i]t is well established that a claim of fair representation requires a showing of bad faith, discrimination, or arbitrary conduct on the part of the union." 843 F.2d at 876 (citing *Vaca*).

[15] *Burkevich* v. *ALPA*, 894 F.2d 346, 349 (9th Cir. 1990); *Moore* v. *Bechtel Power Corp*, 840 F.2d 634, 636 (9th Cir. 1988); *Galindo* v. *Stoody Co.*, 793 F.2d 1502, 1513-1514 (9th Cir. 1986); *Peterson* v. *Kennedy*, 771 F.2d 1244, 1254 (9th Cir. 1985). These decisions seem to be in conflict with *Barthelemy* v. *ALPA*, 897 F.2d 999, 1005-1006 (9th Cir. 1990), and *Bernard* v. *ALPA*, 873 F.2d 213, 216 (9th Cir. 1989).

between the two.[16] The First Circuit took note of a contention that fair representation claims are subject to "bifurcated standards," but found it unnecessary to decide whether separate standards should be recognized.[17] Commentators have also discussed the possibility of different standards in negotiation and grievance processing.[18]

Many of the statements recognizing different standards for contract negotiations and contract administration have been dicta. Moreover, in preceding footnotes, we have alluded to circumstances that tend to undercut the authoritativeness of those statements—and thus perhaps to mitigate the need for this Court's review. Nevertheless, when this body of case law is examined as a whole, it displays a significant division of opinion on the question whether the standards of conduct to which unions must adhere in negotiating agreements are different from those applicable to contract administration. In our view, the uncertainty in this area is sufficient to call for this Court's attention.

2. If the Court grants review and concludes that a showing of arbitrary conduct is sufficient to establish a breach of the duty of fair representation, this case also provides an excellent opportunity to clarify the standards for determining whether a union has acted arbitrarily. The court of appeals indicated that arbitrariness could be found in a case in which a union has relinquished an established right of bargaining unit employees without receiving anything of value on their behalf. We would agree if it could be shown that the right of the employees was clearly

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[16] *Parker* v. *Connors Steel Co.*, 855 F.2d 1510, 1519-1520 (11th Cir.), cert. denied, 109 S. Ct. 2066 (1989). *Parker* stated that "in the context of negotiations," a violation of duty is established if the union's conduct "is arbitrary, irrational, or in bad faith." *Id.* at 1520. "In the context of grievance processing," the court continued, "the employee must show that the union's handling of the grievance was either arbitrary, discriminatory, or done in bad faith." *Ibid.*

[17] *Berrigan* v. *Greyhound Lines, Inc.*, 782 F.2d 295, 297-299 (1st Cir. 1986).

[18] See, e.g., Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, 1979 U. Ill. L.F. 35; Harper & Lupu, *Fair Representation as Equal Protection*, 98 Harv. L. Rev. 1212, 1259-1266 (1985).

established at the time of the union's decision and if it was also clear at that time that nothing of value was received in exchange. But we disagree with the court of appeals' determination that a finding of arbitrariness could be made in this case. In our view, the court failed to take sufficient account of the legal and practical uncertainties confronting the union at the time of the settlement. Thus, the court's approach could pose severe problems for future efforts to achieve negotiated solutions of labor disputes.

The court of appeals concluded that "a jury could find that the order and award left the striking pilots worse off in a number of respects than complete surrender to [Continental]." Pet. App. B11. Most importantly, according to the court, the order and award deprived returning strikers of the right they would have had to compete with working pilots (many of whom had less seniority) for all positions encompassed by the 85-5 bid as well as later vacancies. *Id.* at B12, B14. However, when the union agreed to entry of the award and order, Continental was taking the position that it had definitively awarded the positions in the 85-5 bid to working pilots. In fact, the airline had initiated an action to invalidate bids for those positions that had been submitted by strikers. In this situation, the union faced a choice between, on the one hand, pursuing litigation to establish the strikers' rights to all of the contested positions and, on the other, accepting a compromise providing returning strikers with access to some 85-5 bid positions.

We believe that, at the time of the settlement, there was uncertainty as to whether returning strikers were legally entitled to compete for positions encompassed by the 85-5 bid. Under this Court's decisions, Continental was entitled to employ permanent replacements and cross-over strikers to continue operations during the strike and was not required to discharge those employees to make room for returning strikers. *NLRB* v. *MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938). On the other hand, Continental would have been required to offer returning strikers *vacant* positions equivalent to those the strikers had held before going on strike (absent countervailing legitimate and substantial

business justifications for refusing to do so). *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). Unjustified refusals to reinstate strikers who offer unconditionally to return to work "discourage employees from exercising their rights to organize and to strike." *Ibid.*

The issue left unsettled by this Court's decisions is whether 85-5 positions "awarded" to working pilots would have been considered "vacancies" available to returning strikers. Continental's position, as we understand it, has been that the bid procedure serves its legitimate interest in designating particular employees for anticipated vacancies in advance, so that the airline can begin at once to provide necessary training and arrange to fill positions vacated by pilots who have bid successfully for better jobs. Under that position, refusing to rebid those vacancies to accommodate returning strikers could not be characterized as an unjustifiable infringement of the right to strike. The countervailing argument, as we understand it, is that an award confers only a limited, conditional expectancy of a position and that it would not have undercut Continental's legitimate interests to place returning strikers in positions that were not actually filled or for which training had not commenced. If that view of the bidding process were valid, a refusal to allow returning strikers equal access to positions available when they agreed to return might be viewed as an unjustified infringement of the right to strike.[19]

Regardless of how this dispute might be resolved on its merits, we believe there is no basis on which a trier of fact could find that a decision to opt for a compromise was *arbitrary*. A union in petitioner's position could legitimately take account of the risks and delay inherent in litigation in deciding whether to agree to

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[19] The fact that some strikers had submitted bids for positions covered by the 85-5 bid gave rise to an additional complexity. We understand that Continental sought to invalidate all those bids on the ground that they were part of a union ploy to place disloyal pilots in a position where they could disrupt the airline's operations. In view of that dispute, a litigated solution would have required a court to resolve the competing claims of three groups of pilots: (1) working pilots who bid for 85-5 positions, (2) striking pilots who submitted contested bids for those positions, and (3) strikers who sought reinstatement without having submitted timely bids.

a negotiated settlement. Further, the district court decision cited in the court of appeals' opinion, *ALPA* v. *United Air Lines, Inc.*, 614 F. Supp. 1020, 1045-1046 (D.C. Ill. 1985), aff'd in part, 802 F.2d 886 (7th Cir. 1986), cert. denied, 480 U.S. 946 (1987), did not clearly establish the pilots' entitlement to the 85-5 bid positions. When petitioner consented to the entry of the order and award, the *United Air Lines* decision was on appeal; the outcome of the appeal could not be known; and, especially in view of the differences between the facts of the United and Continental disputes, the Seventh Circuit's decision might well not have been followed in the circuit in which most litigation between petitioner and Continental had been brought.[20]

A mistake in the assessment of the state of the law on this issue at a particular time would not ordinarily call for this Court's review. However, the court of appeals' decision in this case appears to involve a more fundamental problem. In its recitation of the standards by which it determines whether a union has acted arbitrarily, the court, quoting its opinion in *Tedford*, emphasized that it was necessary to determine whether a decision challenged in a fair representation case is "*a rational result of the consideration of [permissible union] factors*." Pet. App. B10. Judged by its application in this case, that standard appears to permit imposition of liability based upon a union's failure to anticipate

[20] As petitioner has noted (Pet. 25-26), in *United Air Lines*, the carrier rebid the entire airline in the early days of a strike, and the district court concluded (in light of other facts) that the rebid was motivated by anti-union animus. 614 F. Supp. at 1046. The court of appeals affirmed on this basis. 802 F.2d at 898-900. The availability of such a rationale in this case was – at the very least – subject to doubt.

In considering the significance due the district court's decision in *United Air Lines*, we believe that standards governing the availability of qualified immunity to public officials provide a useful analogy. In determining whether an official is immune from liability for an alleged violation of a plaintiff's constitutional rights, his action is "assessed in light of the legal rules that were 'clearly established at the time it was taken." *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818-819 (1982).

the manner in which an unsettled issue of law will be resolved.[21] In our view, the imposition of liability on that basis would contradict the principles recognized in *Ford Motor Co.* v. *Huffman*, 345 U.S. at 337-338. Thus, this case affords an opportunity for this Court to consider whether, in its articulation and application of the *Tedford* formulation, the Fifth Circuit has departed from the correct standard for determining what conduct qualifies as arbitrary.[22]

3. The standards circumscribing a union's duty of fair representation are an important element of federal labor law. Properly defined, the duty of fair representation provides significant protection to employees and, at the same time, gives unions needed leeway to pursue negotiated settlements. "The heart of the Railway Labor Act is the duty, imposed by [45 U.S.C. 152, First] upon management and labor, 'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and

[21] We note that, in the present case, the underlying issue of law is still in dispute.

The court cited evidence suggesting that Continental had honored returning strikers' seniority in the past and could be expected to do so in the future. Pet. App. B12-B14 & n.3. However, even if it would have been arbitrary for petitioner to fail to act on the indications cited by the court, petitioner would still have had to confront the question whether Continental would withdraw its "awards" of 85-5 bid positions and permit returning strikers to compete for them. That is, an assurance that strikers would have been returned on the basis of seniority would have resolved just one of two questions facing petitioner after the closing of the 85-5 bid; the other was whether Continental would be required to return strikers to positions encompassed by that bid.

[22] We note that respondents have also argued, *inter alia*, that petitioner's leadership consented to the entry of the order and award based upon self-interest and political motivations, concealed their actions from the rank-and-file and their representatives, and falsely assured striking pilots that any agreement would be submitted for ratification. See Pet. App. B7. The court of appeals did not decide whether there were disputed issues of fact requiring a trial on those allegations of bad faith. These theories of liability could be considered on remand if the Court were to grant review and vacate the court of appeals' judgment.

the employees thereof.' " *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377-378 (1969). See *Chicago & N.W. Ry. Co.* v. *United Transportation Union*, 402 U.S. 570, 574 (1971); *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 758-761 (1961). The statute's objective is "to prevent, if possible, wasteful strikes and interruptions of interstate commerce." *Detroit & Toledo Shore Line R.R.* v. *United Transportation Union*, 396 U.S. 142, 148 (1969). Because of their potential impact on national transportation systems, strikes in transportation industries can have particularly severe effects on the national economy.

Recent years have seen a number of bitter labor disputes in the interstate transportation industries. Uncertainty regarding the extent to which settlements will expose unions to liability for a breach of the duty of fair representation can only complicate the efforts of management, unions, and federal mediators to achieve negotiated resolutions of those disputes. Cf. *International Brotherhood of Elec. Workers* v. *Foust*, 442 U.S. at 51-52. Because potential litigants in interstate transportation industries often have a choice among forums in various circuits, national uniformity in this area is particularly important. Finally, although this case arises in the context of the Railway Labor Act, the duty of fair representation also applies to employees represented by unions under the National Labor Relations Act, 29 U.S.C. 151 *et seq*. See *Ford Motor Co.* v. *Huffman*, 345 U.S. at 337.

4. Petitioner suggests (Pet. 29) that it would be appropriate for the Court to grant the petition, vacate the court of appeals' judgment, and remand for reconsideration in light of the decision in *Trans World Airlines, Inc.* v. *Independent Fed. of Flight Attendants*, 109 S. Ct. 1225 (1989). We disagree. In *TWA*, a decision rendered after the events at issue, the only question presented was whether full-term strikers were entitled to displace cross-overs who held positions at the conclusion of a strike. The Court did not address the separate issue of when cross-overs (or, for that matter, permanent replacements) acquire an interest in a position sufficient to defeat the reinstatement rights of returning full-term strikers. Nor did it address the questions of fair representation presented here. Under these circumstances, Court's decision in *TWA* does not justify summary disposition of this case.[21]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[21] Respondents argue (Br. in Opp. 7) that review is not warranted because the court below remanded the case for further proceedings and thus its decision is interlocutory. But the court of appeals has finally determined the applicable legal standard and concluded, erroneously in our view, that a trier of fact could find the union's conduct to be arbitrary. The case is suitable for review at this juncture, because there is an "important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 225 (6th ed. 1986); see *id.* at 225-226 and cases cited therein.

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